In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The decision and opinion of the District Court of Appeal of the State of California for the Second Appellate District is reported in 205 Cal.App.2d 108, and in 22 Cal.Rptr. 718. It is also found at page 121 of the Transcript of Record. The order of the California Supreme Court denying a hearing without opinion is noted in 205 Cal.App.2d 116.

JURISDICTION

On August 22, 1962, the California Supreme Court denied a hearing after petition from the decision of of the California District Court of Appeal for the Second Appellate District (R. 130). The jurisdiction of this Court was invoked under 28 U.S.C. 1257 (3). Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, was granted on June 17, 1963. "Review is limited to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure." 374 U.S. 826.

QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution compelled the exclusion of evidence received in the state criminal prosecution of petitioner for armed robbery, where this evidence was found by police officers during a search of petitioner's transient hotel room in his absence and with the consent of the hotel clerk.

STATEMENT OF THE CASE

Proceedings In The State Courts.

On November 28, 1960, an amended Information charging petitioner with armed robbery occurring on or about the 25th day of October, 1960, was filed by the District Attorney for the County of Los Angeles, State of California. Petitioner was also charged with

two prior felony convictions: (1) conviction of murder on December 10, 1941, and (2) conviction of the crime of grand theft on December 20, 1943 (R. 2-3).

After two Deputy Public Defenders of Los Angeles County were appointed to represent petitioner (R. 4, 5), and both were relieved of the appointment by the Court upon motion of petitioner, Frank Duncan, Esq., was appointed as petitioner's attorney (R. 7). Petitioner entered a plea of not guilty and denied commission of the prior offenses (R. 5).

The case came to trial on March 27, 1961 before a jury. On March 29, 1961, the jury returned a verdict of guilty as charged (R. 8-9). Prior to the trial of the cause, petitioner admitted commission of the prior offenses charged (R. 8, 13).

On April 6, 1961, petitioner's motion for a new trial was denied and he was sentenced to imprisonment in the State Prison for the term prescribed by law. The Court also found petitioner to be a habitual criminal (R. 10, 120).

The District Court of Appeal of the State of California, Second Appellate District, Division Two, affirmed the judgment of conviction on June 26, 1962 (R. 130). The Supreme Court of the State of California, sitting in bank, denied petitioner's application for a hearing on August 24, 1962 (R. 130).

STATEMENT OF THE FACTS

The Robbery.

On October 25, 1960 at approximately 8:00 P.M., a Mr. David Greely was working as a night clerk in the Budget Town Market in Monrovia, California (R. 16). At this time, two men, subsequently identified as petitioner and one Peter Schales, then 22 years old (R. 48), entered the store, selected a pizza and brought it up to the check stand attended by Mr. Greely (R. 16, 46-47). After Greely opened the cash register, petitioner drew a .45 caliber automatic pistol and told him to put all of the money in a paper sack. Greely then placed an estimated $1,000.00 in cash and checks in a 12-pound paper sack. About $800.00 of this was cash (R. 21, 48). Petitioner then directed Greely to lie down on the floor (R. 17).

About this time, Mrs. Donna May Ray, who also worked in the store, came out from a back room where she had been working (R. 28). When she noticed petitioner standing there with a gun, he told her to go behind the counter with Mr. Greely, the clerk (R. 29).

After petitioner and Peter Schales left the Budget Town Market, they split up the loot with each getting approximately $400.00 of the cash. The checks were thrown out somewhere along the route the two robbers took after they left the market (R. 48, 94).

In addition to the testimony of the two victims, Peter Schales, petitioner's partner in the commission of the robbery, testified for the prosecution concerning their plans to rob the market and the conduct of the

robbery (R. 43-60). And, over objection that it was involuntary (R. 92), testimony was received concerning petitioner's confession (R. 93-94).

Petitioner was described to the police as being 35 to 40 years of age, 5' 10" in height, wearing a gray shirt, a gray sweater, a gray hat, and horn-rimmed glasses (R. 21).

The Arrest And Search.

During the investigation at the scene of the crime, the manager of the store turned over a checkbook to Detective Gilliland of the Monrovia Police Department which had been found near the scene of the robbery. Subsequently, it was determined that it belonged to petitioner (R. 68-69). The check stubs indicated that two checks had been written to the Mayfair Hotel. The Mayfair was described as a "transient type of hotel" (R. 68). On one check stub, the notation "for rent" was written. Gilliland then checked with the Pomona Police Department and learned that petitioner had been convicted of murder and robbery (R. 70). He obtained a photograph or mugshot of petitioner and showed it to the victims. Gilliland reported that the victims ". . . both stated that this looked like the man who held the gun, however, they would like to see him in person." (R. 71).

Detective Gilliland's testimony described the ensuing investigation as follows:

> "A. The 27th of October, 1960. Mr. Collins and myself proceeded to Pomona. We made contact with the Pomona Police Department, two

detectives, Detective Oliver and Rowland, and discussed the Mayfair Hotel for a short time, and then they stated that they would go with us to the Mayfair Hotel since we were not too familiar with it. And two different police cars went to the Mayfair Hotel, parked on the City parking lot directly east of the hotel, went into the lobby, the four of us. We approached the desk, the night clerk, and asked him if [fol. 96] there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.

We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.

We asked him if he would give us permission to enter the room, explaining our reasons for this.

Q. What reasons did you explain to the clerk?

A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'

Q. Is that what the clerk told you?

A. Yes, sir.

Q. What else happened?

A. We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along

with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a [fol. 97] key in the lock, unlocked the door, and says, 'Be my guest.'

Q. What did you do?

A. We entered the room, and the first thing that was observed was a pair of horn-rimmed glasses laying on a desk in the northeast corner of the room. I picked the glasses up and looked at them and noted that they answered the description of the glasses described by one of the victims." (R. 71-72).

The search of the room then disclosed the following items which were received in evidence: a .45 caliber automatic pistol with a clip and several cartridges, a pair of horn-rimmed glasses, and a gray coat.

Petitioner was arrested at approximately noon on Saturday, October 29, 1960, in the City of Las Vegas, Nevada (R. 79).

The Defense.

Petitioner's defense was essentially one of alibi. Two witnesses testified that on the night and at the time of the robbery, petitioner was with them at a residence (R. 101-02; 109-10). Petitioner did not testify to his whereabouts on the night of the robbery. There was also evidence that prior to the robbery, on October 21, 1960, petitioner applied for and was given a loan for $170.00, allegedly to pay various bills which had accumulated due to the separation from his wife (R. 115-16).

SUMMARY OF RESPONDENT'S ARGUMENT

At the outset it should be made clear that respondent does not attempt to justify the search conducted in this case as incident to petitioner's arrest. *Agnello v. United States*, 269 U.S. 20 (1925). The search of the hotel room was not incidental to the arrest, ". . . for it was at a distance from the place thereof and was not contemporaneous therewith." *People v. King*, 60 A.C. 259, 262, 32 Cal.Rptr. 825, 384 P.2d 153 (1963); *People v. Gorg*, 45 Cal.2d 776, 781, 291 P.2d 469 (1955); *Tomkins v. Superior Court*, 59 Cal.2d 65, 67, 27 Cal.Rptr. 889, 378 P.2d 113 (1963); *Castenada v. Superior Court*, 59 Cal.2d 439, 442, 30 Cal.Rptr. 1, 380 P.2d 641 (1963); *People v. Haven*, 59 Cal.2d 713, 719, 31 Cal.Rptr. 47, 381 P.2d 927 (1963). We have consistently maintained the view, in the California District Court of Appeal, and now in this Court, that the search and seizure here in question should be tested by the doctrine of consent to search rather than the doctrine of a search incident to a lawful arrest.

We submit that the search and seizure was lawful because: (1) it was with the consent of the hotel clerk who had actual authority to consent to the search because the hotel retained the dominion and control over the room assigned to petitioner; and (2) the officers conducting the search were justified in believing in good faith that the hotel clerk had authority to consent to the search.

Moreover, the attempt to label the objects seized as "mere evidence" in contradistinction to "means"

or "instrumentalities," does not render the search and seizure unlawful. For we believe that these artificial distinctions should not be considered a part of the test of "reasonableness" applicable to the States by the Fourteenth Amendment. But even if such sophistry is deemed a part of the test which the States must follow, the items of evidence here received in evidence were worn or used in the commission of the robbery and, thus, must be considered to be "means" or "instrumentalities" of the crime.

Finally, even if the search was unlawful or if the items seized are deemed mere "evidence," and hence impermissible objects of a search, their admission in evidence constitutes "harmless error."

ARGUMENT

I

THE SEARCH OF PETITIONER'S HOTEL ROOM WAS LAWFUL BECAUSE IT WAS CONDUCTED WITH THE CONSENT OF THE HOTEL CLERK WHO WAS CLOTHED WITH BOTH ACTUAL AND OSTENSIBLE AUTHORITY TO CONSENT TO THE SEARCH.

It is settled that a search and taking of evidence, freely consented to by one who has the authority to give such consent, is not unreasonable under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1960); *Davis v. United States*, 328 U.S. 582, 593-94 (1945); *Zap v. United States*, 328 U.S. 624, 628 (1945); *Feguer v. United States*, 302 F.2d 214, 248-49 (8th Cir. 1962) *cert. den.* 371 U.S. 872; *People*

v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852 (1955). Thus, in the *Abel* case, a search of a hotel room was upheld where petitioner had vacated a room and "[t]he hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made." 362 U.S. at 241. And in *Feguer v. United States*, the search of a room with the consent of the landlord was upheld though the tenant's term had not yet expired where the tenant left the room taking all of his belongings with him. 302 F.2d at 249.

The pivotal question in this case is whether or not there was actual or apparent authority on the part of the hotel clerk to consent to the search of petitioner's hotel room.

A. The Hotel Clerk Had Actual Authority To Consent To The Search.

The record establishes that the hotel retained dominion and control over the rooms it let. The hotel was a "transient type of hotel," instead of a place where persons maintain permanent residence (R. 68). In addition to this fact, the hotel regulations required that the key to a guest's assigned room ". . . be placed in the mail box each time they left the hotel" (R. 71). Under California property law, the hotel management retained control of the rooms, halls, lobbies and other portions of the hotel. *Fox v. Windemere Hotel Apart. Co.*, 30 Cal.App. 162, 164-65, 157 Pac. 820 (1916); *Roberts v. Casey*, 36 Cal.App.2d Supp. 767, 771-72, 93 P.2d 654 (1939); *People v. Vaughn*, 65

Cal.App.2d Supp. 844, 150 P.2d 964 (1944). Thus, the hotel has a right of access and control over every part of the hotel, even though lodgers such as petitioner are given a license to use separate parts. And the hotel plainly has a right to make and enforce any reasonable regulations necessary for the protection of other guests. The right of privacy is reasonably subject to this power. Here the hotel clerk had good reason to fear for the safety of other guests when the officers told him of the robbery and the use of a gun. Indeed, his response to these proffered reasons for the officers' request to enter the room was, "In this case, I will be more than happy to give you permission and I will take you directly to the room." (R. 72).

We submit, therefore, that this record supports the conclusion that the hotel clerk had actual authority to admit the officers to petitioner's room to search.

B. The Hotel Clerk Had Apparent Authority To Consent To The Search.

The rule is well settled in California that officers may conduct a search of a defendant's dwelling place upon the authority and consent of a third person, where there is evidence that the officers entertain a good faith belief based upon sufficient facts that the person consenting to the search had the authority to do so. *People v. Gorg, supra,* 45 Cal.2d 776, 291 P.2d 469 (1955); *People v. Caritativo,* 46 Cal.2d 68, 292 P.2d 513 (1955) *cert. den.* 351 U.S. 972; *People v. Burke,* 208 Cal.App.2d 149, 24 Cal.Rptr. 912 (1962); *People v. Crayton,* 174 Cal.App.2d 267, 344 P.2d 627 (1959);

People v. Ambrose, 155 Cal.App.2d 513, 318 P.2d 181 (1957); *People v. Shepard*, 212 Cal.App.2d 697, 28 Cal.Rptr. 297 (1963); *People v. Kelly*, 195 Cal.App.2d 699, 16 Cal.Rptr. 177 (1961). We submit that in this case the officers had ample information upon which to form a good faith belief that the hotel clerk had the authority to consent to the search.

This Court has recently stated, "[t]he states are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . ." *Ker v. California*, 374 U.S. 23, 34 (1963). We submit that this "workable rule" does not violate the basic constitutional command of the Fourth Amendment that a search be reasonable. The "reasonableness" of this rule may be tested by considering the policy bases underlying the Fourth Amendment protection.

First, the rule certainly does not offend the policy of deterring lawless police activity, because under the test, the officers must believe on sufficient facts and in good faith that there is authority to consent. Plainly, this test does not encourage or tolerate unlawful police conduct.

Second, the policy of protecting the right of privacy by the basic standard of "reasonableness" is not impaired by this California rule. For it is at once clear that the right of privacy is not absolute; the right is subject to such invasions as meet the standard of

"reasonable." Thus, we allow a search of a dwelling incident to a lawful arrest without warrant. *Agnello v. United States, supra,* 269 U.S. 20 (1925); *Marron v. United States,* 275 U.S. 192 (1927). In these cases, the threshold standard allowing this invasion of privacy is "reasonable cause to believe a felony has been committed." Additionally, of course, the search must be contemporaneous and the premises contiguous to the place of arrest. A search under these circumstances then is not one which can be conducted in the unfettered discretion of the law enforcement officer. Whether there is a permissible invasion of the right of privacy, *i.e.,* a "reasonable" search under the Fourth Amendment, is tested initially by the officer's good faith belief based on probable cause that a felony has been committed in his presence.

Similarly, the California rule allowing a search where there is a good faith belief that the person consenting to a search has the authority to consent, while it allows an invasion of privacy, does not allow it in the unfettered discretion of the police officer.

Finally, it is an altogether reasonable search and seizure rule which turns, not upon the niceties of property law which the law enforcement officer cannot be expected to know and understand, but on facts and circumstances which indicate to the reasonable person that one purporting to grant consent to search has the authority to do so.

Respondent submits therefore that this "workable rule" satisfies the fundamental criterion of the Fourth Amendment that a search be reasonable.

The rule just discussed is appropriately applied to this case. The police officers asked the night clerk if he would give them permission to enter petitioner's room. They explained to him that they were there to make an arrest of a man who had possibly committed a robbery and that they were concerned that he had a weapon (R. 72). The night clerk answered, "In this case, I will be more than happy to give you permission and I will take you directly to the room." (R. 72). After conducting the officers to petitioner's room, the night clerk placed a key in the lock, unlocked the door, and said, "Be my guest." (R. 72). The night clerk thus expressed an implied authority to consent to the entry, and it may reasonably be found that the officers who searched petitioner's room relied upon the night clerk's voluntary and affirmative expressions of consent to conclude that the management did, in fact, have authority to let them in. Moreover, the officers were aware of the fact that the hotel regulations required petitioner to leave the key to his room with the clerk when he left the hotel (R. 72). The officers' knowledge of this fact provides further justification for their reliance on his apparent authority to enter petitioner's room.

It is therefore submitted, that the search conducted in this case was lawful because of the actual and apparent authority of the hotel night clerk to give such consent.

II

THE OBJECTS SEIZED DURING THE SEARCH WERE USED OR WORN BY PETITIONER DURING THE COMMISSION OF THE ROBBERY AND WERE PERMISSIBLE OBJECTS OF A SEARCH AND SEIZURE.

A. The "Mere Evidence" Rule Does Not And Should Not Apply To The States.

Petitioner suggests that one of the factors which indicates that the search and seizure conducted in this case was unreasonable under the Fourth Amendment, was that the horn-rimmed glasses and the gray coat were "merely evidentiary" and hence improper objects of a search. *Gouled v. United States*, 255 U.S. 298 (1921). Implicit in this argument is the view that this rule, though not heretofore applied to the States, is essential to a "concept of ordered liberty" and hence is applicable to the States through the Fourteenth Amendment. We submit that the rule does not rise to this level of importance and that it should not be extended to the States.

It is true that ". . . the standard of reasonableness is the same under the Fourth and Fourteenth Amendments", *Ker v. California, supra*, 374 U.S. 23, 33 (1963), and that both federal and state officers must respect the "same fundamental criteria," *Mapp v. Ohio*, 367 U.S. 643, 658 (1961), laid down by the Fourth Amendment. *Ker v. California, supra.* But we believe that the "mere evidence" rule is not, and should not be, part of the constitutional test of reasonableness.

This rule is solely of federal origin and appears to have developed out of this Court's "'. . . exercise

of its supervisory authority over the administration of criminal justice in the federal courts. . . .'" *Ker v. California, supra*, 374 U.S. at 31, quoting from *McNabb v. United States*, 318 U.S. 332, 341 (1943). Its application to every day law enforcement in the States would seriously hamper the effective enforcement of penal laws in the States. Few indeed are the cases where there is not some item of physical evidence, which has been seized either by warrant, incidental search, or a search by consent and has been introduced in the trial of the case because it is a vital link between the crime and the criminal, which could not be denominated "mere evidence." Are not, for example, finger prints, blood stains, hair, cloth fibers and similar objects "mere evidence," rather than "means" or "instrumentalities?" Yet such scientific evidence is singularly reliable and where it is lawfully obtained, it would be patently absurd to exclude it upon the ground that it is "merely evidentiary."

In earlier times such scientific evidence was not recognized as having probative value and hence it was not likely to be the object of a search. Aside from books and papers, which might or might not be "means and instrumentalities," it may be surmised that seldom was there occasion to search for objects other than "means," "instrumentalities," "contraband" or the "fruits" of crime. Thus, what appears as the practice of former times, has jelled into an inflexible rule of law which cannot be justified today.

The distinctions between items which are "merely evidentiary" and those which are "means" or "instrumentalities" of crime are indeed elusive, if not altogether illusory. There has been great difficulty in applying this rule to specific fact situations, and the cases are confused and some totally inconsistent. Compare *Gouled v. United States, supra,* with *Zap v. United States, supra,* 328 U.S. 624 (1945), and *United States v. Lefkowitz,* 285 U.S. 452 (1931) with *Marron v. United States, supra,* 275 U.S. 192 (1927). Professor Kamisar has noted that ". . . the area is so cluttered with inconsistencies and uncertainties as to permit much freedom of movement. While 'a search for an object of purely evidentiary significance' may be taboo, objects have and will continue to be found to possess a bit more than 'purely evidentiary significance' just about whenever a resourceful judge wants to so find.". Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891, 917 (1960), (footnotes omitted).

The Second Circuit in *Matthews v. Correa,* 135 F. 2d 534, 537 (2nd Cir. 1943) also commented, somewhat in despair, that "[t]he line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up."

Additionally, it has been noted that the rule is without a substantial policy basis. See Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule*

in Search of A Reason, 20 U. Chi. L. Rev. 319 (1953). The rule appears to be an unwarranted extension of the rule prohibiting exploratory searches conducted to find some evidence against one suspected of crime. Many cases can adequately be explained on this ground. The Fourth Amendment itself does not mention a restriction on the seizure of "mere evidence." Even as to search warrants, the constitutional language is not phrased in terms of restricting the kind and character of items seized, but in terms of the particularity with which the items sought must be described. The Amendment states that ". . . no warrants shall issue, but upon probable cause . . . and *particularly describing the* place to be searched, and the persons or *things to be seized.*" (Emphasis added.) The plain effect of this requirement is not to forbid the search for some categories of objects, but to proscribe the rummaging and exploratory search. An exploratory search offends the canon of "reasonableness" under any view and must of course be prohibited. We believe this latter rule provides sufficient protection against over-zealous law enforcement officers.

California has adopted a search warrant rule which allows for the search for "mere evidence," yet does not condone the exploratory search. A search warrant will issue for items which constitute ". . . evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony." Cal. Pen. Code § 1524, subd. 4.

We submit that such a search pursuant to a warrant and the search by consent in this case do not

contravene the "fundamental criteria" of the Fourth Amendment that a search be reasonable.

Again, the "mere evidence" rule is not and should not be a constitutional command of the Fourth Amendment applicable to the States through the Fourteenth Amendment.

But even if the rule against seizure of "merely evidentiary" objects is applicable to the States, it should not apply to a case such as this where there is consent to search. For a freely given consent is a waiver of any objection that the search and seizure is "unreasonable" under the Fourth Amendment. *Zap v. United States, supra,* 328 U.S. 624, 628 (1945). This concept of limiting the kind of items which are subject to seizure would appear to have relevance in this case only insofar as it can be said that a search consented to becomes unreasonable because it exceeds the scope of the consent granted. The question is not whether the character of the items is such as to indicate the reasonableness of the search, but whether the items are of such a nature that the officers could seize them when they were discovered during the course of a search consented to by one who has the authority to so consent, but who, it may be conceded, has no authority to consent to seizure of personal property belonging to another.

B. The Objects Seized In This Case Were Not "Mere Evidence".

Whether viewed as a question of the scope of the consent to search and seize, or as a factor indicating "reasonableness" of a search and seizure, we believe

the "merely evidentiary" rule is not properly invoked in this case. For under either approach, the objects received in evidence in this case were not "merely evidentiary" but must be deemed "means" or "instrumentalities" of the robbery.

First, it should be noted that fairly implied in the officers' testimony concerning the search, is that after learning the petitioner was not likely to be found in his room, they went to his room to search for the weapon he was reported to have used in the commission of the robbery (see R. 72). The possession of a gun by one previously convicted of a felony is itself a felony in California. Physical possession is not essential. The crime can be committed if the gun is under "custody or control" of an ex-felon. Cal. Pen. Code § 12021. The officers knew that petitioner had been convicted of a felony (R. 70), and further that he had been identified as the robber brandishing a .45 caliber automatic during the commission of the robbery. Plainly then the gun was a permissible object of a search and seizure. Moreover, it may reasonably be concluded that the "systematic search" (R. 72) was conducted to find this weapon, and thus the search was not a mere rummaging or exploratory search.

In the course of the search for this weapon, the officers were not required to overlook other articles of evidentiary value and subject to seizure which were turned up. "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search, it would be entirely with-

out reason to say that he must return it because it was not one of the things it was his business to look *for." Abel v. United States, supra,* 362 U.S. 217, 238 (1947). Thus, if they were properly subject to seizure as "means" or "instrumentalities" during a lawful search, the glasses and hat were lawfully seized even though the officers' purpose in searching was to find the weapon used by petitioner.

Whatever may be said about the classification of other articles of evidence, it is plainly apparent that items of apparel, here a pair of horn-rimmed glasses (with paint spots across the front of them (R. 26)) and a gray coat, worn in conjunction with a hat with the brim turned down (R. 61), during the commission of an armed robbery, are within the classification of "means" or "instrumentalities." Petitioner concludes that such innocent items as these could not be deemed a disguise. But while they may not have the concealing effect of a stocking mask or a halloween costume, they were, nevertheless, instrumental in obscuring petitioner's features so as to make identification more difficult. This is demonstrated by the fact that petitioner's apparently distinctive hair and bushy eyebrows (R. 23, 39-40), were not perceived by the two victims.

We submit, therefore, that these items of apparel, worn during the commission of the robbery, were properly seized.

III

IF THE ITEMS RECEIVED IN EVIDENCE ARE CONSIDERED TO HAVE BEEN OBTAINED AS THE RESULT OF AN UNLAWFUL SEARCH AND SEIZURE, THE PREJUDICIAL ERROR RULE SHOULD APPLY.

A. Application Of California's Rule Of Prejudicial Error To This Case Does Not Violate The Fourteenth Amendment.

Since voluntarily adopting the "exclusionary rule" in 1955, *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905, California's appellate courts have decided several hundred cases involving the legality of searches and seizures and the admissibility of evidence obtained by the searches. In reviewing all of these cases, our courts have applied, where necessary, and as commanded by the California Constitution, the prejudicial error rule. We have followed a test similar to that which this Court has applied to the review of federal cases. See 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1945).

Article VI, section 4½, was added to the California Constitution by amendment in 1914 and commands that the California appellate courts not reverse a case on the ground of ". . . the improper admission or rejection of evidence . . ., unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California should be allowed to apply this standard of harmless error to this case, unless its application conflicts with the Fourteenth Amendment. The majority of this Court has not passed on the question

of whether ". . . the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' . . . ." *Fahy v. Connecticut*, 84 S.Ct. 229, 230 (1963). But four members of this Court have concluded that a standard which ". . . required a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial," was not repugnant to the Fourteenth Amendment. *Id.* at 234 (dissenting opinion). The California standard is phrased in like terms, and can, we submit, constitutionally be applied to this case.

The reasons for the application of the harmless-error rule to cases where illegally obtained evidence has been received in a criminal prosecution have been well stated by Mr. Justice Harlan and Mr. Justice Traynor. In *Fahy v. Connecticut, supra,* Mr. Justice Harlan writes:

> "It is obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission. The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case. Erroneously admitted 'constitutional' evidence may often be more prejudicial than erroneously admitted 'unconstitutional' evidence. Since the harmless-error rule plainly affords no shield under which prosecutors might use damaging evidence, unconstitutionally obtained, to secure a conviction, there is no danger that application of the rule will undermine the prophylactic function of the rule of

inadmissibility." 84 S.Ct. at 234 (dissenting opinion).

In *People v. Parham*, 60 A.C. 333, 33 Cal.Rptr. 497 (1963), Mr. Justice Traynor states:

"Unlike involuntary confessions, other illegally obtained evidence may be . . . only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. . . . Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him . . ., we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. . . . The state does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission for illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty, not for the officers' illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless re-trial. . . . An exclusionary rule so rigidly administered

could thereby defeat itself." 60 A.C. at 340-41, 33 Cal.Rptr. at 501.

We submit that these persuasive reasons compel the conclusion that the prejudicial error rule does not offend the Fourteenth Amendment and that it should be applied to this and like cases. Where fairly and conscientiously applied, this rule does not deny an appellant life, liberty or property without due process of law.

B. Petitioner Was Not Prejudiced By The Introduction Of The Disputed Items In The Present Case.

The facts of the present case present a classical example of the propriety of the harmless-error rule. In the present case, the evidence complained of as being improperly admitted consisted of a gun, cartridges and clip, a coat and a pair of glasses. That none of these items had any serious impact on the jury is plain from a review of the entire record.

There was a dispute among the prosecution witnesses as to whether or not the coat presented in court was in fact the coat worn during the crime. Two employees of the Budget Town Market testified that this *appeared to be* the coat petitioner had worn (R. 26, 30). However, petitioner's accomplice testified that it was not the coat worn during the robbery (R. 48).

Another item was a pair of glasses found in the defendant's room (R. 71). The impact, if any, these had upon the jury appears exceedingly speculative, but certainly they were of little consequence in the

case. Again, these were only identified as being *similar to* ones worn by petitioner during the robbery (R. 26, 31).

The third item consisted of a gun, with cartridges and a clip which were found in defendant's room (R. 73, 98-99). Although at first view, the impact of a gun upon a jury would appear to be fairly serious, it should be remembered that one of the store employees testified only that this gun *was similar* to that used in the robbery. He did not identify it as *the* gun used in the robbery (R. 17). Further, while the second employee testified that it was the gun (R. 29), her identification of it was based only on a view of the muzzle end and was effectively discredited by defense counsel on cross-examination (R. 31-32). Moreover, petitioner freely admitted, as a part of his confession, that this was the gun used in the robbery (R. 94). Thus, independent of the introduction of this gun in evidence, there was evidence that petitioner used a gun during the robbery. Indeed, the prosecution could have chosen to use a similar gun for demonstrative purposes before the jury. *People v. Jordan,* 188 Cal.App.2d 456, 10 Cal.Rptr. 495 (1961). The testimony of the prosecution witnesses in such a case would have been that the gun admitted for demonstration purposes *was similar to* the gun used by the defendant. This would have had the same impact on the jury as the admission of the gun here introduced.

This same argument is also applicable to the glasses. Similar glasses for the purpose of demon-

stration could have been presented by the prosecution. The testimony of the prosecution witnesses that they were similar to those used in the robbery would have been proper.

Furthermore, neither the gun, the coat, nor the glasses were in any sense a necessary, or even cogent, link between the defendant and the crime. The prosecution's case was complete without them.

The testimony of the prosecution witnesses produced to establish petitioner's participation in the robbery was overwhelming. Two employees of the Budget Town Market testified as to the robbery, identifying petitioner in open court as the robber (R. 16, 28). In addition to the positive identification of the petitioner in court before the jury, the same witnesses had identified him as the robber when shown pictures of him by the police. This followed the discovery in the store parking lot of the checkbook imprinted with the name "Joey L. Stoner" (R. 38, 70-71). One of the witnesses had also given the officers a good description of petitioner (R. 21). Finally, these same witnesses identified petitioner in a lineup and, indeed, were even able to describe some of the other persons in the lineup with him and recall how they differed (R. 22-23, 36-37).

Added to this positive and repeatedly clear identification of petitioner, the prosecution produced his accomplice, Peter Schales, who had entered a plea of guilty to this same robbery. Schales testified that he had planned and participated in the robbery with petitioner. He described the manner of conducting

the robbery, including the fact that petitioner held the gun on the victims (R. 47). Added to all of this evidence, the prosecution had the voluntary confession of petitioner admitting his participation in the robbery.

Thus, the prosecution had an overwhelming case against petitioner, and it is plain that the admissibility of the disputed items was merely cumulative. Comparing all of this direct testimony with the mere demonstrative character of the items taken from the hotel room, when similar demonstrative items could have been placed before the jury, it is evident that it cannot be said that ". . . a result more favorable to the appealing party would have been reached in the absence of the error." *People v. Watson,* 46 Cal.2d 818, 836, 299 P.2d 243 (1956).

We submit that the application of this test compels the affirmance of the judgment of conviction in petitioner's case.

C. Should This Court Hold The Prejudicial Error Rule Applicable To This Case, The Cause Should Be Remanded To The California District Court Of Appeal For The Determination Of The Prejudicial Effect, Subject To Further Review By This Court.

Since the evidence in this case was held to have been lawfully seized, California has not had occasion to apply its harmless-error rules. In the event that this Court determines the evidence to have been unlawfully obtained, respondent urges that the case be remanded to the California District Court of Appeal in order that the issue of prejudice can be resolved according to California standards of harmless error.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the judgment of conviction in petitioner's case be affirmed.

Dated, San Francisco, California,
January 29, 1964.

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